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IN THE

# Supreme Court of the United States

**October Term, 1970**

**No. 559**

CALLAHAN MINING CORPORATION & SUBSIDIARY,
PINNACLE EXPLORATION, INC.,

*Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

The Commissioner of Internal Revenue, in his brief opposing the grant of certiorari, accurately summarizes petitioner's position as to the effect of *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (Br. 7-8), and then states that this position "has no support in *Mountain Producers* and, *in fact, was specifically rejected in that case*" (Br. 8, emphasis added).

The italicized words are wholly inaccurate. As stated both in the petition (Pet. 8) and in the Commissioner's brief (Br. 7), this Court in *Mountain Producers* held that gross income used to pay expenses was not allocable to the holder of a royalty measured solely by *gross* income but rather to the holder of the interest affected by the costs of production. The Court held that it was improper "to construct a theoretical gross income" by adding to the taxpayer's income expenses which it did not bear. 303 U.S. at 382. The Court most certainly did not hold that taxpayers whose interests are measured by *net* profits are

deprived of the benefit of depletion on gross income used to pay expenses *actually borne* by that taxpayer's share of profits.

Indeed, as set forth in the petition (Pet. 8), the *logic* of *Mountain Producers* compels the conclusion that lessors—such as petitioners—whose interests are measured by *net* profits are entitled to depletion based not only on the share of profits distributed to them in cash but also on that portion of gross income used to pay the expenses which diminish their share of profits. To allocate to lessees income used to pay expenses which diminish lessors' income would be to "construct a theoretical gross income" for lessees in square conflict with the principle of *Mountain Producers*. The Commissioner's brief contains no discussion whatsoever of the point, except for the *ipse dixit* above quoted.

## CONCLUSION

**The petition for certiorari should be granted.**

Respectfully submitted,

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